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328-979—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 763

BERNHARD ROSEE, PETITIONER

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS KIBBY AND GORDON IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the district court (App. 30–131 [1]) nor the order of the court of appeals (Pet. App. 4–5) is reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1968 (Pet. App. 4–5), and a timely petition for rehearing was denied on June 26, 1968 (Pet. App. 3). On September 16, 1968, Mr. Justice Marshall extended the time within which to file a petition for certiorari to and including November 23, 1968, and the

[1] "App." refers to the appendix to petitioner's brief in the court of appeals. "Supp. App." refers to the supplementary appendix to petitioner's brief in the court of appeals. "Pet. App." refers to the appendix to the petition for certiorari.

App. 42). Upon petitioner's failure to satisfy the award, the board of directors suspended him from membership on the Board of Trade and, after the award had remained unsatisfied for more than two years, sold his membership for $8,800 (App. 42).

Petitioner filed this suit in an Illinois court on July 12, 1963, naming as defendants the Board of Trade, various of its officers, the members of the Arbitration Committee, Baggot, Morrison and two Chicago officials of the Commodity Exchange Administration, Kibby and Gordon (App. 1). The complaint alleged that several of the Board of Trade defendants since 1956 had conspired to deprive Rosee of his membership on the Board of Trade and to destroy his business (App. 5); that Baggot and Morrison joined the conspiracy in 1959 (App. 6), and the members of the Arbitration Committee and Kibby and Gordon in 1960 (App. 7–8). It sought actual damages of $353,000, punitive damages of $1 million and restoration of his membership on the Board (App. 10, 13). The sole allegation relating to Kibby and Gordon was that they "contrived to conceal the conversions of funds from plaintiff by Baggot & Morrison and the charging to plaintiff's account of trades made by other persons, even though said defendants had full knowledge of such occurrences and were repeatedly requested by plaintiff to take action with respect thereto" (App. 8–9).[2] The gravamen of petitioner's charges

[2] This was the third such suit that Rosee had filed. He nonsuited his first action, filed in the State court; his second suit, filed in the federal court and identical to the first except that

against them, as developed during the proceedings in the district court, was that they had submitted false reports to their superiors and had failed adequately to investigate certain charges petitioner had made against Baggot and Morrison (*e.g.* App. 104–105, 109–110, 113, 128–130).

Kibby and Gordon removed the case to the federal court, on the ground that their "acts * * * in furtherance of the alleged conspiracy took place under color of their official positions as agents of the CEA" (App. 30). Two years later, in June 1965—after what the district court characterized as "the fullest possible opportunity to engage in discovery" relating to the claim against Kibby and Gordon (App. 32) and "an extensive period of discovery" (App. 39)—Kibby and Gordon moved to dismiss as to them, on the ground that everything they had done was part of their duties as federal officers and thus privileged, or, alternatively, for summary judgment (App. 17). They submitted three affidavits. One (App. 18–19), by the Director of the Compliance Division of the Commodity Exchange Administration in Washington, D.C., stated that the investigations by Kibby and Gordon relating to this case were under his direction and control. Gordon submitted an affidavit that he was a Supervisory Investigator and Chief of the Compliance Section of the agency in Chicago; that one of his duties included investigating trade practices and activities of traders

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the United States was also named a defendant, was dismissed for lack of jurisdiction upon the finding that petitioner had made the United States a defendant merely to obtain discovery from it (App. 31).

and commission merchants; and that under CEA regulations he was without authority to initiate investigations of violations of the Commodity Exchange Act and Regulations (App. 19–21). Kibby filed an affidavit that he was Commodity Exchange Supervisor of the Chicago Office of the CEA; that his duties included supervision of and participation in the investigations of persons and firms subject to the Commodity Exchange Act in Chicago; and that he had no authority to initiate investigations (App. 21–22).

In June 1966 the district court denied the motion to dismiss but granted summary judgment in favor of Kibby and Gordon, and remanded the action against the remaining defendants to the State court (App. 29–30). In an exhaustive opinion which discussed in great detail the facts relating to each of petitioner's allegations (App. 30–131), the court concluded that "plaintiff has been unable to produce even a scintilla of evidence which would suggest there is any factual basis for the allegations made in his complaint against Kibby and Gordon" (App. 129).[3]

After briefing and oral argument, the court of appeals affirmed *per curiam*. The court held (Pet. App. 5) that there was "support in the record for

[3] Approximately ten months later, while the case was on appeal, petitioner filed a motion under Rule 60(b), F.R. Civ. P., to set aside the grant of summary judgment for fraud, on the ground that a document that had been submitted to the court *in camera* was false (App. 131–138). The district court denied the motion (App. 224), stating at the argument thereon that it had not assumed the accuracy of a particular document that petitioner claimed had misled the court (Supp. App. 100). Petitioner then appealed from the denial of his motion, and the court of appeals consolidated the appeals.

the judgment of the district court which considered plaintiff's aliegations, including the alleged conspiratorial arrangement of defendants with certain non-government defendants (not now before this court) relative to the business account of plaintiff, and correctly concluded on this record that there is no factual basis for plaintiff's conclusion of wrongdoing on the part of defendants or that defendants were responsible for plaintiff's alleged damages."

ARGUMENT

1. The district court was fully warranted in granting summary judgment in favor of the federal officials. As the district court's extensive opinion demonstrates, after two and one-half years of discovery petitioner had been unable to produce any evidence that Kibby and Gordon had been parties to any illegal conspiracy. There had been extensive discovery; in 1965 the district court rejected the claim of the Commodity Exchange Administration that various documents in its possession sought by petitioner were privileged, and directed the agency to produce them. 36 F.R.D. 684, 691. The court of appeals upheld the grant of summary judgment, holding "on this record that there is no factual basis for plaintiff's conclusion of wrongdoing on the part of defendants or that defendants were responsible for plaintiff's alleged damages" (Pet. App. 5). The correctness of the grant of summary judgment raises only factual questions as to which there is no occasion for further review. Since both courts below determined that petitioner had raised no triable issues of

fact, petitioner was not entitled to a jury trial. Cf. *Galloway* v. *United States,* 319 U.S. 372.

2. The decision below may also be upheld on the alternative ground that the federal officials were immune from suit because all their acts upon which petitioner predicates their liability were done in the course of their official duties. *Barr* v. *Matteo,* 360 U.S. 564; *Howard* v. *Lyons,* 360 U.S. 593; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503; *Alzua* v. *Johnson,* 231 U.S. 106; *Spalding* v. *Vilas,* 161 U.S. 483; *Bradley* v. *Fisher,* 13 Wall. 335; *Kendall* v. *Stokes,* 3 How. 87. The official immunity rule has been applied in actions predicated upon the very type of tortious conduct which allegedly forms the basis for the present suit: conspiracy [4] and injury to business or professional reputation.[5]

The gravamen of petitioner's contentions with respect to Kibby and Gordon was that they performed their official duties improperly, as part of a conspiracy. The record shows that the various inspections and reports upon which petitioner relies were all made as part of their regular governmental functions (App. 18–22). The immunity is not destroyed because of the allegation that in performing their

[4] *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Brictson* v. *Woodrough, et al.,* 164 F. 2d 107 (C.A. 8), certiorari denied, 334 U.S. 849; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

[5] *Le Burkien* v. *Notti,* 365 F. 2d 143 (C.A. 7); *Brictson* v. *Woodrough, et al.,* 164 F. 2d 107 (C.A. 8), certiorari denied, 334 U.S. 849; *Bowman* v. *White,* 388 F. 2d 756 (C.A. 4), certiorari denied October 14, 1968, *sub nom. Bowman* v. *First National Bank of Harrisonburg,* 37 L.W. 3137.

duties the government officials acted pursuant to a conspiracy with outsiders. *Yaselli* v. *Goff*, 12 F. 2d 396 (C.A. 2), affirmed *per curiam*, 275 U.S. 503.

3. Petitioner was not denied adequate discovery as to the CEA. The district court on February 16, 1965, after *in camera* inspection of documents,[6] ordered the official in charge of the Chicago office of the CEA to produce the materials sought by petitioner, with the only relevant condition being that with respect to "daily and periodic reports filed with the Authority," petitioner was to specify particular dates (36 F.R.D. at 691). There is nothing to show that this order was not complied with.

4. Finally, the district court did not abuse its discretion in denying petitioner leave to amend his complaint to add counts under the antitrust laws and the Federal Tort Claims Act (28 U.S.C. 1346(b)). The action had been pending in the district court for nearly three years, and it was petitioner's third suit arising out of the same matter. Moreover, any claim against Kibby and Gordon under the antitrust laws would be precluded by the immunity doctrine discussed above, and any claim under the Federal Tort Claims Act would not only require adding the United States as a defendant, but would also be barred by the two-year statute of limitations in that Act. Under *Foman* v. *Davis*, 371 U.S. 178, 182, relied upon by petitioner, the district court in its discretion justi-

[6] Petitioner misconceives the significance of the *in camera* inspection of the documents by the district court. That inspection was made to afford the court the opportunity to consider the request for discovery—not to decide the case upon the basis of such inspection. See 36 F.R.D. at 687.

fiably concluded that in these circumstances such an amendment of the complaint, with its inevitable further delay, was unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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